

SERVED: February 22, 2007

NTSB Order No. EA-5268

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of February, 2007

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17772
v.)	
)	
JUAN CARLOS VARGAS,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the order of Administrative Law Judge William A. Pope, II, issued on September 28, 2006.¹ By that order, the law judge granted the Administrator's motion for summary judgment on her emergency revocation of respondent's

¹ A copy of the law judge's decisional order is attached.

mechanic certificate with airframe and powerplant ratings.² As discussed below, we deny the appeal.

The Administrator's order, filed as the complaint in this proceeding, alleged that:

1. You are now, and at all times mentioned herein, were the holder of Mechanic Certificate Number 002798305 with airframe and powerplant ratings.
2. By letters dated October 4, 2004, and July 5, 2005, you were advised by the FAA that there is uncertainty about your qualifications to hold a mechanic certificate with airframe and powerplant ratings and that a reexamination of your competency is necessary.
3.
 - a. As requested in the above letters, on December 5, 2005, you submitted to a reexamination of your qualifications at the Flight Standards District Office in Orlando, Florida.
 - b. The results of the above reexamination were unsatisfactory.
4.
 - a. You submitted to a second reexamination of your qualifications on January 13, 2006, at the Flight Standards District Office in Orlando, Florida.
 - b. The results of the above reexamination were also unsatisfactory.

Accordingly, the Administrator determined that respondent lacked the qualifications necessary to hold his mechanic certificate with airframe and powerplant ratings, and therefore that safety

² On August 2, 2006, through counsel, respondent waived the expedited procedures normally applicable to emergency revocation proceedings under the Board's rules.

in air commerce and the public interest required revocation of respondent's certificate.

In his answer to the complaint, respondent admitted to paragraphs 1 and 2, and summarily denied paragraphs 3 and 4. Respondent also claimed several affirmative defenses, namely, that, "there was no cause established for the reexamination," respondent was "not provided a reasonable opportunity to respond to the allegations," and the testing associated with his original qualification for his mechanic certificate was "adequate and otherwise legitimate."³

³ As we noted in Administrator v. Rodriguez, a case involving similar issues but where the respondent was challenging the Administrator's indefinite suspension pending a reexamination:

It is understandable that a certificate holder whose qualifications are perceived as having come under attack for reasons beyond his control may be displeased, even resentful, because of the possible burden and inconvenience that a reexamination might entail. At the same time, we would hope that such certificate holders would eventually appreciate that whatever personal hardships they may face are far outweighed by the risks to the public that may flow from permitting aircraft to be serviced by the inadequately trained or unqualified. We would add, moreover, our view that the Administrator's efforts to ensure the competence of certificate holders where genuine doubts arise should be applauded, not reviled.

Prior to the scheduled hearing, the Administrator submitted a motion for summary judgment. Attached to the Administrator's motion was an affidavit from Robert L. Cunningham, the aviation safety inspector who served as proctor during the two reexaminations, and an excerpt from the Administrator's written sanction guidance set forth in Order 2150.3A. See Motion for Summary Judgment, Attachments 1 and 2. Inspector Cunningham stated that respondent scheduled and took the written portion of his reexamination on December 5, 2005. The written exam is a computer-based test, and a grade of 70 percent or higher is required to pass the test. Respondent scored 52 percent. Consistent with FAA policy, respondent was permitted to take a second reexamination and he scheduled the second test for January 13, 2006. He again failed the exam, this time with a score of 55 percent.⁴ The Administrator's written sanction guidance states that, "[g]enerally, if the certificate holder has twice submitted to a reinspection or reexamination, and has twice failed, the certificate should be revoked." See Motion for Summary Judgment, Attachment 2. Respondent did not dispute the factual allegations in the complaint, and instead argued the

⁴ Attached to Inspector Cunningham's affidavit are copies of respondent's FAA Airman Knowledge Test Reports for the December 2005 and January 2006 written tests, and these documents corroborate Inspector Cunningham's testimony that respondent failed both reexamination attempts.

aforementioned "affirmative defenses." The law judge granted the Administrator's motion and affirmed revocation of respondent's mechanic certificate.

On appeal, respondent does not identify any error in the law judge's decisional order. Respondent also does not contest Inspector Cunningham's affidavit, and, indeed, respondent does not attempt to demonstrate that any material issue of fact remains in dispute.⁵ Instead, respondent again asserts the aforementioned "affirmative defenses" that, essentially, the original reexamination request was unjustified and the result of any exams undertaken pursuant to that request should be disregarded.⁶ This argument, however, was rendered moot when respondent submitted to the reexamination. Board precedent on the issue is well-settled. See Administrator v. Wollgast, 7 NTSB 1216, 1217 (1991) ("[T]he only relevant question after the [reexamination] test has been given is not whether the

⁵ Our rules specify that an appeal brief "shall enumerate the appealing party's objections to the law judge's initial decision...and shall state the reasons for such objections...." Section 821.48(b)(2), 49 C.F.R. Part 821. Curiously, respondent's appeal brief is nearly an identical copy of his response to the Administrator's motion for summary judgment.

⁶ To the extent we have not discussed other specific arguments raised by respondent on appeal, we have nonetheless considered them in the context of the record as a whole and found them to be without merit. Similarly, respondent's argument that the complaint violates the stale complaint rule and should be dismissed is unavailing, for the rule plainly includes an exception for cases alleging, as this one clearly does, lack of qualifications. 49 C.F.R. § 821.33.

Administrator's doubts about the airman's competence were reasonably justified, but, rather, whether his competence was in fact successfully demonstrated"). See also Administrator v. Rodriguez, supra.

Thus, on this record there is no genuine dispute that respondent chose to submit to two reexaminations and both times failed to demonstrate his qualifications, and revocation in such circumstances is consistent with the Administrator's written sanction guidance. Summary judgment is appropriate where, as here, there are no genuine issues of material fact. Respondent provides no cognizable basis, nor do we discern one, to disturb the law judge's decision granting the Administrator's motion and affirming her revocation order. We therefore affirm the law judge's decision and order.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's decision, affirming the Administrator's emergency order of revocation of respondent's mechanic certificate with airframe and powerplant ratings, is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.